ALBERTA
LAW REFORM
INSTITUTE

FAMILY LAW PROJECT

The Conclusion

Final Report No. 93

June 2004

ALBERTA LAW REFORM INSTITUTE

EDMONTON, ALBERTA

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ALBERTA LAW REFORM INSTITUTE

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A. Occasion for This Report

[1] On December 4, 2003, the Lieutenant-Governor gave royal assent to the Alberta *Family Law Act*, S.A. 2003, c. F-4.5. The Act will come into force on a date to be proclaimed. Many of the provisions in the *Family Law Act* carry out recommendations made by the Alberta Law Reform Institute [**ALRI**]. Some of the provisions are in areas that ALRI did not address. These are, we think, provisions which belong in a contemporary statute governing private family law relationships, rights and obligations. In short, in our view, the *Family Law Act* is well-reasoned, strikes a good balance in the interplay between different family law elements and is attuned to the 21st century.

[2] The enactment of the *Family Law Act* allows us to issue this final report bringing to a close an ALRI Family Law Project that began more than a decade ago. In this report, we highlight significant stages and events in the Project. Appended to our report is a compendium in which we note selectively the impact of our recommendations on specific provisions in the *Family Law Act*.

B. ALRI Family Law Project

1. Reasons for Project

[3] Family law is by no means a new topic for ALRI. Almost from the date ALRI first opened its doors, family law matters have been on the law reform program. Appendix A contains a list of our family law publications.

[4] The ALRI Family Law Project that fuelled the 2003 *Family Law Act* began in the early 1990s. Family law reform was long overdue in Alberta. Some Canadian provinces had enacted major family law reform statutes in the late 1970s and early 1980s, but Alberta was not among them.[1] Many of the statutory provisions in Alberta embodied outdated concepts and terms. Alberta family law statutes had grown in a piecemeal fashion over many years, resulting in the fragmented treatment of family law legislation, as well as overlap and inconsistencies among the provisions contained in the existing family law statutes. Family law jurisdiction was spread among the Court of Queen's Bench, the Provincial Court (Family Division) and, to a lesser extent, the Surrogate Court; different statutory provisions applied from one court to another; and differences existed in the rights recognized, remedies available and procedures followed. Differences in federal and provincial family law caused awkwardness and confusion for family members who asked the courts to help sort out their rights and obligations.

[5] ALRI set itself the goal of responding to these shortcomings by recommending legislation to modernize, rationalize and consolidate Alberta family law. In our view, providing a sound contemporary legislative framework would

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[1] The work that began in the early 1990s represented ALRI's second major effort to influence family law reform in Alberta. ALRI had observed problems of a similar nature almost two decades earlier. At that time, we published *Matrimonial Property* (Report No. 18) (Edmonton: ALRI, August 1975); the *Status of Children* (Report No. 20) (Edmonton: ALRI, June 1976); *Family Law Administration: Court Services* (Report No. 26) (Edmonton: ALRI, April 1978); and *Matrimonial Support* (Report No. 27) (Edmonton: ALRI, March 1978). Matrimonial property law is now a mainstay of family law. With respect to the status of children under the law, our recommendations to focus on the relationship between parent and child rather than on the marital relationship of the parents were adopted in full in 1991, save for outright abolition of the status of illegitimacy. Our work on spousal support included recommendations for the attachment of salary or a debt (then garnishee) that were enacted in the *Domestic Relations Act*, *infra* note 2, Part 4.

assist decision making by the courts, litigants and other persons dealing with family law matters.

2. Core Family Law Project

[6] The Family Law Project undertaken by ALRI in the early 1990s proceeded in two stages. In order to guide us in making our recommendations in the second stage, we developed a set of general premises which we believe laid an important foundation for family law reform. These premises are reproduced in full in Appendix B. The *Family Law Act* generally respects these premises.

a. Stage one

[7] Initially, the project focussed on the *Domestic Relations Act*,[2] Alberta's principal family law statute. First enacted in 1927, the *Domestic Relations Act* was based on England's *Matrimonial Causes Act, 1857*[3] as it stood on July 15, 1870. Although some updating had occurred to take into account changing societal attitudes toward marriage and family, many of the provisions in the original *Domestic Relations Act* had remained unaltered since 1927.

[8] We published Report No. 65, entitled *The Domestic Relations Act (DRA), Phase 1 – Family Relationships: Obsolete Actions*, in March 1993. As the title indicates, that report covered obsolete actions having to do with family relationships. In it, we made recommendations for the abolition of six obsolete matrimonial actions which, in our view, had ceased to provide a realistic foundation for preserving and protecting the stability of marriage and the family in contemporary Alberta society. Those obsolete actions were: restitution of conjugal rights; judicial separation; damages in tort for adultery, enticement or harbouring of a spouse; damages in tort for enticement or harbouring of a child; damages in contract for breach of promise of marriage; and jactitation of marriage. We recommended further study of the issue of damages for loss of consortium through the tortious injury of a spouse or child (an action that does not exist fundamentally to protect the marriage or family because it doesn't serve to deter the tortious

---

[2] R.S.A. 1980, c. D-37; now R.S.A. 2000, c. D-14.

[3] 20 & 21 Vict., c. 85.

conduct in question). We also made recommendations regarding the disposition of gifts made in contemplation of marriage from one engaged person to the other. We did not think further recommendations were required for declarations of marital or parental status.[4]

[9] In Report No. 65, we forecast two more phases of the project. In phase 2, we would examine the law relating to spousal and child support, and in phase 3 we would consider the law of guardianship, custody and access. We stated that later we would consider undertaking projects that permit legal recourse prior to marriage breakdown in order to promote family stability. This plan was modified.

b. Stage two

[10] After publishing Report No. 65, and as the project progressed, we determined that revising the *Domestic Relations Act* gave the project too restrictive a focus. We therefore expanded it to encompass several statutes in addition to the *Domestic Relations Act*. These statutes included: *Maintenance Order Act*;[5] *Parentage and Maintenance Act*;[6] *Provincial Court Act*,[7] Part 3; *Child Welfare Act*,[8] Part 5; and *Surrogate Court Act*,[9] sections 10 and 13.

[11] We also came to comprehend that doing a proper job of formulating recommendations on spousal and child support and on child guardianship, custody and access would require an in depth understanding of the issues in all of these areas. Our plans to separate phase 2 and phase 3 would not work. We therefore

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[4] Alberta law was modernized in 1991 by the addition of the *Domestic Relations Act*, *supra* note 2, Part 8. Part 8 is based on the detailed recommendations contained in ALRI's report on *Status of Children*, *supra* note 1, originally issued as Report No. 20 (June 1976), revised and issued as Report No. 45 (November 1985), and again revised and issued as Report No. 60 (March 1991).

[5] R.S.A. 1980, c. M-1; now R.S.A. 2000, c. M-2.

[6] S.A. 1990 c. P-0.7; now R.S.A. 2000, c. P-1.

[7] R.S.A. 1980, c. P-20; now R.S.A. 2000, c. P-31.

[8] S.A. 1984, c. C-8.1; now R.S.A. 2000, c. C-12.

[9] R.S.A. 1980, c. S-28, ss. 10, 13; now R.S.A. 2000, c. S-25, ss. 10, 14 as rep. by R.S.A. 2000, c. 16 (Supp.), s. 37.

decided to publish documents containing recommendations in family law reform in these areas in a boxed set rather than sequentially. That set consisted of an *Overview* and three accompanying Reports for Discussion [**RFDs**]:

> **RFD No. 18.1—Overview**
> This document shaped the framework for consideration of the issues raised in the three RFDs and provided background information that is common to all of them. It was designed so that it could be read in conjunction with any one of these RFD's individually or the set as a whole.
>
> **RFD No. 18.2—*Spousal Support***
> In this report, we examined the financial rights and obligations of spouses to support each other. The report included an examination of the support rights and obligations of men and women who, although not married to each other, are living together in a marriage-like relationship.
>
> **RFD No. 18.3—Child Support**
> In this report, we examined the financial obligations of parents to support their children, including children who have reached adult age. The report included an examination of the support obligations owed by persons who stand in the place of parents (*in loco parentis*), for example, step-parents. Reporting on child support separately from spousal support underscored that different rationales underlie the support obligation for spouses and children.
>
> **RFD No. 18.4—Child Guardianship, Custody and Access**
> In this report, we covered the responsibilities of parents, or parent substitutes, to provide care, guidance, control and protection in bringing up children. Those responsibilities were contained within the operative concepts of guardianship, custody and access.

Each of these RFDs focussed on the basic principles and policy that the law should carry out, that is, the reform of the substantive law. We also included recommendations with respect to the court powers that are necessary to give effect to the substantive law.

3. Topics not Covered

[12] The boxed set of RFDs did not cover every family law topic. First, we restricted our project to private law, that is, the law governing the rights and

responsibilities of individuals (family members) to each other.[10] Second, by and large, we did not deal with the enforcement of family law orders. Third, we did not address issues relating to court structure, jurisdiction and process. Fourth, we saw a need to make only minor recommendations for reform of the law establishing parentage. The law already incorporates the recommendations we made in our reports on the *Status of Children*[11] and we did not examine the effect, on the law governing parentage, of procreation through the use of new reproductive technologies. Fifth, we did not examine statutes that regulate the formation of relationships or relationship status (*e.g.*, *Marriage Act*,[12] *Legitimacy Act*,[13] adoption). Sixth, generally, we considered the law governing the relationship between parent and child up to 18 years of age only, although we included recommendations for the support of young adults in some circumstances. Seventh, our recommendations on guardianship did not include the management and protection of property owned by the child (which, although commonly referred to as trusteeship, is sometimes also referred to as guardianship). Instead, we proposed to consider some of these areas for future projects.

4. Spin-off Projects

[13] Nor was this the full story. Other topics suggested themselves as we moved forward with the project. Work in two further areas emerged. We published Research Paper No. 20 on *Court-connected Family Mediation Programs in Canada* in May 1994. The research for this publication was conducted with the cooperation of the Premier's Council in Support of Alberta Families. We published Report No. 74 on *Protection Against Domestic Abuse* in February 1997.[14] We initiated this project for the purpose of recommending reform of the civil remedies available to persons at risk of domestic abuse.

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[10] Public law, the counterpart of private law, pertains to the relationship between the state (government) and individuals in our society.

[11] *Supra* note 4.

[12] R.S.A. 1980, c. M-6; now R.S.A. 2000, c. M-5.

[13] R.S.A. 1980, c. L-11; now R.S.A. 2000, c. L-10.

[14] ALRI's work on this project led to the enactment of the *Protection Against Family Violence Act*, R.S.A. 1990, c. P-27.

5. Ever-changing Landscape of Public Opinion, Policy and Law

[14] During the course of the project, and subsequently, fundamental changes in societal attitudes, public policy and the law were taking place.

[15] Mid-way through our project, the federal government introduced Child Support Guidelines to govern awards of child support under the *Divorce Act*.[15] This required us to rethink the basis for awarding child support under Alberta law which applies to children other than the children of divorce.

[16] Years earlier, in 1976, we had recommended that the status of a child should be based on the relationship between the child and each parent and not, as previously, on the relationship between the parents (whether married or unmarried, whether living conjugally, separated or divorced). Our recommendations were implemented in 1991, following Canada's adoption of the United Nations *Convention on the Rights of the Child*.

[17] By 1998, increasingly, marriage-like relationships were being recognized as relationships that should attract at least some of the incidents of marriage when they were no longer intact. In 1989, we had recommended that reforms relating to "unmarried cohabitants" be undertaken on a statute by statute basis, but not generally.[16] In 1996, we addressed the issue of how to define a "marriage-like" relationship in our project on intestate succession and, in RFD No. 16, proposed a definition for the purpose of consultation.[17] We confined our proposal to intestate succession because we thought it inappropriate to recommend a definition for general use in the narrower context of that project. However, when the issue of definition arose in the Family Law Project, we adopted a definition very like the one we had proposed for intestate succession.

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[15] R.S.C. 1985 (2d Supp.), c. 3.

[16] ALRI, *Towards Reform of the Law Relating to Cohabitation Outside Marriage* (Report No. 53) (Edmonton: ALRI, June 1989).

[17] ALRI, *Reform of the Intestate Succession Act* (Report for Discussion No. 16) (Edmonton: ALRI, January 1996); see also ALRI, *Reform of the Intestate Succession Act* (Report No. 78) (Edmonton: ALRI, June 1999).

[18] By the time we issued the boxed set of RFDs in our Family Law Project, courts interpreting the requirements set down in the Canadian *Charter of Rights and Freedoms* had determined that opposite sex couples in marriage-like relationships bore support obligations to each other on breakdown of the relationship identical to the obligations owed by married persons.[18] More recently, the courts have extended this obligation to same sex couples.[19]

[19] The *Charter* jurisprudence has had a major impact on the direction of family law reform. Throughout the years of transition following the issue of our boxed set of RFDs and other family law reports, we kept a close watch on the developments in court decisions. In 2002, we published Research Paper No. 21 on opposite and same sex cohabitants[20] setting out our ongoing research. Our purpose was to add to the debate on the treatment of marriage-like partners under a number of statutes and to assist in informing policy decisions.

6. Conclusion

[20] So concludes our account of ALRI's independent family law activity since 1990. In the next section of our Report (heading C), we look at government activity in family law reform. There, we give an account of our role in response to the government's Family Law Reform Project.

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[18] See e.g. *Miron v. Trudel*, [1995] 2 S.C.R. 418, 124 D.L.R. (4th) 693; *Rossu v. Taylor* (1998), 216 A.R. 348, 161 D.L.R. (4th) 266, 1998 ABCA 193.

[19] See e.g. *M. v. H.*, [1999] 2 S.C.R. 3, 171 D.L.R. (4th) 577.

[20] ALRI, *Recognition of Rights and Obligations in Same Sex Relationships* (Research Paper No. 21) (Edmonton: ALRI, January 2002).

C. ALRI Response to Alberta Justice Family Law Reform Project

1. Consultation on RFD Nos. 18.1 to 18.4

[21] As already stated, one of ALRI's goals was the modernization, rationalization and consolidation of Alberta's family law. Our core project concentrated on family support obligations and the rearing of children. As already stated,[21] prior to the enactment of the *Family Law Act*, the statutes dealing with these areas of private law included, in addition to the *Domestic Relations Act*: the *Parentage and Maintenance Act*; *Provincial Court Act*, Part 3; *Child Welfare Act*, Part 5; and *Surrogate Court Act*, sections 10 and 13. The support obligations of extended family members were dealt with in the *Maintenance Order Act*.

[22] We published our RFDs in 1998. They are drafted in the style of final reports, but with the intention that they would provide an informed basis for future consultation by ALRI and the Alberta government in what we originally anticipated would be a joint process. Changes to the recommendations would then be made as appropriate. Over the course of time and in light of the fast pace of social and legal change affecting family law, Alberta Justice orchestrated its own consultation with assistance and responses from ALRI along the way.

2. Alberta Justice Family Law Consultations

[23] Alberta Justice issued two documents on family law reform in January 2002 – a Public Workbook for public consultation and a Technical Workbook for consultation with lawyers and judges. The Workbooks acknowledged the reliance placed on the prior work of the Alberta Law Reform Institute, not only in RFD Nos. 18.1 to 18.4, but also in the various reports which ALRI has issued on family law.

[24] After closely comparing our original recommendations with the positions being floated in the Alberta Justice papers, we prepared our submission. In it, we responded to the recommendations put forward and the questions raised in both

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[21] See above para. 10.

Workbooks. We were gratified to see not only that the Workbooks relied heavily on our publications, but also that they proposed the adoption of many – indeed, the majority – of our recommendations.

[25] Where the views of Alberta Justice differed from those set out in our RFD Nos. 18.1 to 18.4, we revisited the issues. In some cases, we revised our position on the basis of information garnered through consultation and intervening occurrences. As we noted in our submission, it would have been tempting to merely restate the recommendations that ALRI had put forward on prior occasions. However, this would have been inappropriate for a number of reasons. First, circumstances and views change, sometimes even in a relatively short period of time, and it is always necessary to ensure that recommendations are reviewed for their current appropriateness. Second, there may be new and emerging issues, or issues which others have raised which were not within ALRI's consideration when we provided our previous recommendations. Finally, insight and understanding may develop over time, so that refinement of our proposals should never be precluded.

[26] We also participated in Alberta Justice invitational consultation forums held in Calgary and Edmonton in March 2002.

[27] Our submission in response to the Alberta Justice Workbooks is posted under "Other Publications" on the ALRI website: www.law.ualberta.ca/alri.

3. Bill 45 – *Family Law Act*

[28] On May 14, 2003, the government introduced Bill 45, the *Family Law Act*, in the Legislature. The Bill was then held over to fall so that consultation on its provisions could take place between the spring and fall sessions.

[29] Here again, ALRI is pleased to have assisted with the consultation. In June 2003, we participated in a meeting of lawyers invited by Alberta Justice to comment on Bill 45 from a technical, rather than a policy, point of view.

[30] On November 19, 2003, Bill 45 received Second Reading and went to the Committee of the Whole. There, 65 amendments were introduced. On November 27, 2003, the Committee of the Whole passed the Bill with all of the amendments. The Bill received third reading on December 3, and Royal Assent on December 4, to come into force on a date yet to be fixed by proclamation. Bill 45 takes its place in the Alberta statutes as the *Family Law Act*, S.A. 2003, c. F-4.5.

[31] Many of the 65 amendments were technical, or introduced to effect drafting improvements. However, a few addressed significant matters of policy. We are pleased to report that the policies in Bill 45 which most concerned us had been revisited and were among the amendments. The changes bring the Bill closer in line with the positions we had espoused.

[32] A compendium of the *Family Law Act* containing comments on selected provisions is attached as Appendix C to this Report.

D. Conclusion

[33] We commend the government of Alberta on the enactment of the *Family Law Act*, S.A. 2003, c. F-4.5, and for the plain language drafting. In our view, it is a statute that will serve Albertans well.

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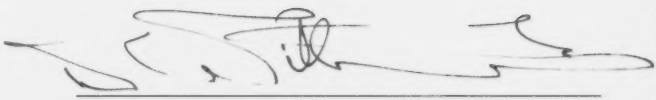

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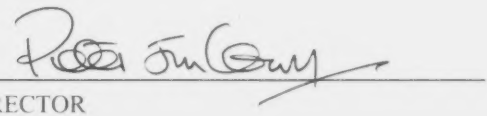

DIRECTOR

June 2004

APPENDIX A
ALRI Family Law Publications

Reports

ALRI Report No. 83—*Division of Matrimonial Property on Death* (May 2000)

ALRI Report No. 78—*Reform of the Intestate Succession Act* (June 1999)

ALRI Report No. 74—*Protection Against Domestic Abuse* (February 1997)

ALRI Report No. 65—*The Domestic Relations Act (DRA)—Phase 1. Family Relationships. Obsolete Actions* (March 1993)

ALRI Report No. 60—*Status of Children: Revised Report, 1991* (March 1991)

ALRI Report No. 57—*Section 16 of the Matrimonial Property* (March 1990)

ALRI Report No. 53—*Towards Reform of the Law Relating to Cohabitation Outside Marriage* (June 1989)

ALRI Report No. 52—*Competence and Human Reproduction* (February 1989)

ALRI Report No. 48—*Matrimonial Property: Division of Pension Benefits Upon Marriage Breakdown* (June 1986)

ALRI Report No. 45—*Status of Children, Revised Report, 1985* (November 1985)

ALRI Report No. 43—*Protection of Children's Interests in Custody Disputes* (October 1984)

ALRI Report No. 27—*Matrimonial Support* (March 1978)

ALRI Report No. 26—*Family Law Administration: Court Services* (April 1978)

ALRI Report No. 25—*Family Law Administration: The Unified Family Court* (April 1978)

ALRI Report No. 20—*Status of Children* (June 1976)

ALRI Report No. 18—*Matrimonial Property* (August 1975)

Reports for Discussion

ALRI Report for Discussion No. 18.1—*Overview* (October 1998)

ALRI Report for Discussion No. 18.2—*Spousal Support* (October 1998)

ALRI Report for Discussion No. 18.3—*Child Support* (October 1998)

ALRI Report for Discussion No. 18.4—*Child Guardianship, Custody and Access* (October 1998)

ALRI Report for Discussion No. 15—*Domestic Abuse: Toward an Effective Legal Response* (June 1995)

ALRI Report for Discussion No. 14—*The Matrimonial Home* (March 1995)

ALRI Report for Discussion No. 6—*Sterilization Decisions: Minors and Mentally Incompetent Adults* (March 1988)

Issue Papers

ALRI Issue Paper No. 2—*Toward Reform of the Law Relating to Cohabitation Outside Marriage* (October 1987)

Research Papers

ALRI Research Paper No. 21—*Recognition of Rights and Obligations in Same Sex Relationships* (January 2002)

ALRI Research Paper No. 20—*Court-Connected Family Mediation Programs in Canada* (May 1994)

ALRI Research Paper No. 15—*Survey of Adult Living Arrangements: A Technical Report* (November 1984)

ALRI Research Paper No. 14—*Conference Materials, International Invitational Conference on Matrimonial and Child Support, 27-30 May 1981* (October 1982)

ALRI Research Paper No. 13—*Matrimonial Support Failures: Reasons, Profiles and Perceptions of Individuals Involved* (March 1981) (Vol. 1, *Summary Report*; vol. 2, *Technical Reports*)

ALRI Research Paper No. 11—*Administration of Family Law: The Unified Family Court: Constitutional Opinions* (May 1978)

Consultation Memoranda

ALRI Consultation Memorandum No. 1—*Division of Pension Benefits Upon Marriage Breakdown* (September 1995)

APPENDIX B

List of General Premises

GENERAL PREMISE 1

Compatibility with federal Divorce Act. Alberta legislation should be compatible with the federal *Divorce Act*.

GENERAL PREMISE 2

Inclusiveness. The substantive law and remedies embodied in Alberta legislation on family matters should be as inclusive as is constitutionally open to a province or territory.

GENERAL PREMISE 3

Effective remedies. Alberta legislation should ensure that effective remedies are available on separation.

GENERAL PREMISE 4

Equality among children. Rights and responsibilities relating to children should be based on the relationship between parent and child rather than the relationship between the child's parents.

GENERAL PREMISE 5

Individual fairness. The law should retain the flexibility necessary to achieve fairness in an individual case.

GENERAL PREMISE 6

Consistency with other Alberta legislation. Alberta legislation on spousal support and child support, guardianship, custody and access should be consistent with other Alberta law.

GENERAL PREMISE 7

Consistency with legislation in other Canadian provinces and territories. In developing legislation for Alberta, policy makers should consider whether it is desirable for Alberta legislation to be consistent with legislation in other Canadian provinces or territories.

GENERAL PREMISE 8

Uniform substantive law regime. Alberta legislation should create a uniform and coherent regime of substantive family law.

GENERAL PREMISE 9

Choice of court. Given the existing court structure, Alberta legislation should allow parties to choose the forum in which the remedy is sought, Provincial Court, Family Division, or Court of Queen's Bench.

GENERAL PREMISE 10

Public v. private law. The recommendations for the reform of family law must show an understanding of the interrelationship between private and public law rights and responsibilities.

APPENDIX C

ALRI's Contribution to Provisions in the *Family Law Act*, S.A. 2003, c. F-4.5: A Compendium

In this compendium, we comment briefly on key topics dealt with in the *Family Law Act*, S.A. 2003, c. F-4 [the ***Act***], noting the source of selected provisions, highlighting innovations in the legislation and flagging one or two departures in policy from ALRI's recommendations which we think are significant enough to mention. The square-bracketed references at the ends of sentences refer to section numbers in the *Act*.

By way of introduction, the *Family Law Act* is composed of five introductory sections, followed by seven Parts. In matters involving children, it permits the court to make orders:

- establishing parentage;
- appointing a guardian of the child's person;
- appointing a trustee of the child's property;
- allocating parenting powers, responsibilities and entitlements;
- permitting contact between a child and a person other than a guardian;
- enforcing a parenting order or order permitting contact with the child; and
- requiring the payment of child support.

In matters involving spouses or adult interdependent partners, it permits the court to make an order requiring the payment of support where the relationship has broken down.

With respect to these orders, the *Act* specifies:

- the persons who may apply for the order;
- the persons who are entitled to notice of the application (in the case of parentage and guardianship orders);
- the persons whose consent to the order is required, including the consent of a child 12 years of age or older to a change or termination of guardianship or an order of trusteeship (but subject to the power of the court to dispense with the consent requirement);
- the matters that may be dealt with in the order;
- the terms, conditions and restrictions which the court may impose;

- the circumstances in which the order may be varied; and
- the length of time for which the order endures or when it terminates.

These provisions reflect several of the recommendations in our RFDs 18.1-18.4.

We turn now to our specific comments on the *Family Law Act*.

Sections 1-5

The introductory sections of the *Family Law Act* give definitions for use in the *Act* [**s. 1**]; bind the Crown [**s. 2**]; designate the courts with jurisdiction, conferring jurisdiction on the Court of Queen's Bench over all matters and jurisdiction on the Provincial Court over all matters except for those specified (being matters over which the jurisdiction of provincially-appointed judges is constitutionally constrained) [**s. 3**]; and provide for the transfer of proceedings between the Court of Queen's Bench and Provincial Court [**s. 4**]. These provisions are consistent with ALRI's recommendations.

Section 5 is an innovative addition to Alberta's family legislation. It raises to a statutory duty the ethical duty of a lawyer to promote settlement (now contained in the Law Society *Code of Professional Conduct*). The lawyer must discuss with the litigant alternative methods of resolving the matter in dispute [**s. 5(1)(a)**] and inform the litigant of "collaborative processes, mediation facilities and family justice services known to the lawyer that might assist the parties in resolving those matters" [**s. 5(1)(b)**]. Every application that goes to court must contain the lawyer's signed statement certifying compliance [**s. 5(2)**]. Sections that appear later in the *Act* reinforce the encouragement of processes that lead to the resolution of issues without a court hearing [**ss. 32(2)(c) and 97)**].

Part 1 – Establishing Parentage, sections 6-15

Generally speaking, Part 1 carries forward the provisions relating to the establishment of parentage formerly contained in the *Domestic Relations Act*, Part 9, ss. 7-10, and the *Parentage and Maintenance Act*, s. 8(2). The provisions carried forward from the *Domestic Relations Act* were originally enacted in 1991. They implemented recommendations made by ALRI in Report Nos. 20, 45 and 60 on *Status of Children*, the primary purpose of which was to secure the relationship in law between parent and child irrespective of whether the child's parents were married to each other.

The provisions that deal with children conceived with the assistance of new reproductive technology are new to Alberta family legislation. They address the parentage of a woman who donated the female genetic material for conception of the child [**s. 12**] and the parentage of a man who donated the male genetic material for conception of the child [**s. 13**]. **Section 13** is based on provisions in the *Uniform Status of Children Act* adopted by the Uniform Law Conference of Canada; **Section 12** departs from the Uniform Law Conference position. ALRI identified this as an area in need of attention in a future project but we did not make recommendations.

Part 2 – Guardianship, Parenting and Contact Orders and Access Enforcement, sections 16-45

All decisions under Part 2 are to be made in the best interests of the child [**s. 18(1)**]. ALRI recommended the statutory enactment of a list of factors for the court to consider in determining what is in the best interests and this recommendation is mirrored, for the most part, in the statutory list set out in the *Act* [**s. 18(2)**]. One of the factors in the list is "family violence." Curiously, the definition of "family violence" [**s. 18(3)**] differs from the definition in section 1(e) of the *Protection Against Family Violence Act*[1] which is similar, but not identical, to the definition of "domestic abuse" we recommended in our Report No. 74 on *Protection Against Domestic Abuse*.[2]

Part 2, Division 1 – Guardianship, sections 19-31

Currently, guardianship is dealt with in the *Domestic Relations Act*, Part 7, and the *CWA*, Part 5. The presumption of the joint guardianship of the child's parents [**s. 20**] comes from the *Domestic Relations Act*, Part 7. This presumption was legislated in 1991, and implements recommendations in our Report Nos. 20, 45 and 60 on *Status of Children*.

By and large, understandings about the scope of guardianship and its incidents are derived from the common law. In RFD No. 18.4, ALRI recommended the statutory elaboration of the "responsibilities, rights and duties"

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[1] R.S.A. 2000, c. P-27.

[2] The definition in the *Family Law Act* may have been modelled on section 47 of Prince Edward Island's *Victims of Family Violence Act*, S.P.E.I. 1996, c. 47, although there are differences here as well.

associated with guardianship. Our recommendations are incorporated in the new *Act* **[s. 21]** as a guardian's "powers, responsibilities and entitlements." In a novel provision, the guardians are statutorily admonished to use their "best efforts to co-operate" **[s. 21(2)(c)]**, and to share information with each other **[s. 21(2)(b) and (4)]**. Consistent with ALRI's recommendations, they are also empowered to enter into an agreement with respect to the allocation of guardianship among themselves **[s. 21(2)(d)]**.

The existing law on testamentary guardianship, found in the *Domestic Relations Act*, Part 7, is at once sketchy and archaic. ALRI recommended a more cohesive statutory embodiment of the law. The new *Act* **[s. 22]** carries out some but not all of ALRI's recommendations. The *Act* limits the power of a guardian to appoint a person to assume guardianship on the current guardian's death to a "parent guardian." ALRI would have allowed any guardian to make an appointment. Furthermore, the *Act* limits the power to appoint a guardian to guardianship after the death of the current guardian. ALRI would have allowed a guardian to appoint a person to assume guardianship during a period in which a living guardian cannot fulfill the role because of incapacity. We stand by our recommendations and would prefer to have seen them enacted. In a situation where no testamentary appointment is made, the *Act* allows a surviving guardian to assume the powers, responsibilities and entitlements that had been allocated to the deceased guardian under a parenting order, "subject to any limitations imposed by the court" on the exercise of guardianship powers, responsibilities and entitlements by the surviving parent **[s. 22]**. In applying this provision, we assume, for example, that if the court has ordered supervision of the surviving parent's contact with the child, the surviving parent would not be allowed to take the child into residence.

As now, the court may make a guardianship order. The current provisions are found in the *Domestic Relations Act*, Part 7 and the *Child Welfare Act*, Part 5. In keeping with a number of ALRI's recommendations, the new *Act* expands the procedural requirements and court powers **[s. 23]**. In addition, the *Act* specifies that, acting on a guardian's application or its own motion, the court may review a "significant decision" by a guardian **[s. 30(2)]**. A "significant decision is one that relates to a "serious risk to health or safety" or is "likely to have serious long-term consequences" **[s. 30(1)]**. As well, a guardian or trustee may ask the court for directions **[s. 31]**.

The new *Act* provides for the trusteeship of a minor's estate **[ss. 27-29]**. These provisions fit with recent legislative reform of the law relating to the

protection of a minors' property. They are intended to operate temporarily. A new *Public Trustee Act*[3] and a new *Minors' Property Act*[4] received Royal Assent on March 30, 2004. Upon proclamation, the *Minors' Property Act* will repeal **sections 27-29** so that the *Family Law Act* will no longer deal with minor's estates or trusteeships. Clarification of the law in this area is a welcome initiative. The role of a parent and the involvement of the Public Trustee has been the subject of uncertainty for a considerable time. ALRI did not deal with issues relating to a minor's property, although we identified it as an area in need of attention in a future project.

Part 2, Division 2 – Parenting Orders, sections 32-34

A similar philosophy on the allocation of parenting powers, responsibilities and entitlements underlies the recommendations proposed by ALRI and the statutory provisions enacted in the *Family Law Act*. However, the approach taken to implement the philosophy differs. Both approaches encourage guardians who have ceased living together to reach agreement.

Where the guardians are unable to agree, ALRI proposed a default division of powers, responsibilities and entitlements. Under the division, both guardians would continue to possess some of the powers, responsibilities and entitlements while other powers, responsibilities and entitlements were allocated individually to the guardian with whom the child lived (custodial guardian) or the other guardian (non-custodial guardian). The default division could be adjusted by court order to suit the circumstances of the particular child and guardians.

As do ALRI's recommendations, the *Family Law Act* encourages agreement between guardians who have ceased living together **[*e.g.*, s. 21(2)(a)-(d)]**. However, where the guardians are unable to reach agreement on the allocation of powers, responsibilities and entitlements, they must go to court for a "parenting order" that will do the job for them **[s. 32]**. There is no provision for the allocation of powers, responsibilities and entitlements by default.[5] The term "parenting order" avoids the negative connotations that have come to be associated with the language of

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[3] S.A. 2004, c. P-44.1.

[4] S.A. 2004, c. M-18.1.

[5] We understand that Alberta Justice will consider the issue of default division when it develops Regulations under the *Family Law Act*.

"custody" and "access" formerly used to describe the powers, responsibilities and entitlements of parents who have ceased living together. The *Family Law Act* provisions correlate closely with changes that were being proposed for the *Divorce Act*; recently, however, those reforms were put on hold.

In making a parenting order, the court may allocate powers, responsibilities and entitlements, including the allocation of "parenting time," by schedule if necessary, that is exclusive to a guardian. "Parenting time" includes day-to-day decisions, day-to-day care and control and the supervision of daily activities [**s. 36(6)**]. A parent or guardian is entitled to inquire and be given information regarding a "significant matter" even where the powers, responsibilities and entitlements are allocated to the other guardian. What constitutes a "significant matter" is not defined.

The *Family Law Act* gives credence to dispute resolution processes that may lead to the resolution of issues without court adjudication. We have seen the duty imposed on a lawyer to discuss alternative methods of resolving the dispute and to inform the party of collaborative processes, mediation facilities and family justice services known to the lawyer [**s. 5**]. In a parenting order, where the parties have agreed to be bound by the process, the court may identify a dispute resolution process for any and all future disputes regarding guardianship or parenting arrangements [**s. 32(2)(c)**]. The court also has the power to appoint a mediator or a neutral third party to assist the parties in resolving all or part of the matters in issue before the court [**s. 97**].

Provision is made for notification of a change of residence [**s. 33**]. This accords with section 59(6) and (7) of the *Domestic Relations Act*, section 16(6) and (7) of the *Divorce Act*, and ALRI's position, but specifying at least 60 days notice instead of the current 30 days.

Part 2, Division 3 – Contact Orders, sections 35-37

Under the existing law, an order providing for contact between a child and a person who does not have custody is called an "access order." In the *Family Law Act*, the concept of allocating powers, responsibilities and entitlements pursuant to a parenting agreement or order eliminates the use of the word access for a parent. Where it is appropriate to permit contact between a child and a person other than a guardian, the court may make a "contact order" [**s. 35(1)**]. Ordinarily, leave of the court to make an application is required, on notice to the guardians [**s. 35(2) and**

(4)]. A parent or person standing in the place of a parent is excepted from the leave requirement, as are grandparents in specified situations [**s. 35(2) and (3)**]. Criteria for the court to apply in making a contact order are given [**s. 35(5)**]. ALRI would have limited the ability of a person other than a guardian to apply for contact to situations where (i) the child's parents, if alive, are living separate and apart, or (ii) one of both of the child's parents are deceased. Decisions about contact with children living together with both parents would be left to the parents themselves.

Part 2, Division 4 – Enforcement of Time with a Child, sections 38-45

ALRI did not examine enforcement issues. In Bill 45, Division 4 essentially reproduced the *Domestic Relations Act*, Part 8 on the Enforcement of Access Orders. The amendments introduced in the fall 2003 replaced the entire Division. It now incorporates the new concepts and language associated with parenting and contact orders.

Part 3 – Support Obligations, sections 46-82

Part 3, Division 1 – Support of Child. sections 47-55

ALRI's recommendations on child support are contained in RFD No. 18.3. The influence of our recommendations is apparent in Part 3, Division 1 of the *Family Law Act*. For purposes of the child support obligation, and consistent with the *Divorce Act*, "parent" is defined to include a person standing in the place of a parent [**s. 47**]. However, the obligation of a mother or father to provide child support outweighs the obligation of a person standing in the place of a parent [**s. 51(6)**]. The definition of a "person standing in the place of a parent" is restricted to a step-parent (through marriage or a continuing relationship of interdependence of some permanence with the mother or father of the child) [**s. 48**]. In this respect, it departs from the common law understanding. Nonetheless, as under the common law, the person must have "demonstrated a settled intention to treat the child as the person's own child." A useful addition to Alberta's family law legislation is the identification of factors that bear on the determination of whether a person is standing in the place of a parent [**s. 48**].

To what children is the obligation owed? This is a question of some interest. Ordinarily, the obligation is owed where the child is under 18 years of age. As does the *Divorce Act*, the *Family Law Act* excepts from the obligation the parent of

a child who is a spouse or adult interdependent partner, or is under 18 years of age and has voluntarily withdrawn from the parents' charge and is living an independent lifestyle [**s. 49**].

Under Bill 45, a parent's financial obligation to support a child's education ended when the child reached age 18. We welcome the progressive approach the *Family Law Act* takes toward the obligation to support the education of a child 18 years of age or older. The *Act* extends the obligation to a "child" who is between the ages of 18 and 22, inclusive, where the child is a full-time student and, for this reason, is unable to withdraw from the parent's charge [**s. 46(b)**]. This provision imitates the obligation under the *Divorce Act*, s. 2(1) which, as interpreted by the courts, imposes on parents the responsibility to support their child's higher education. However, neither the *Divorce Act* nor case law interpreting it places an upper age limit on the schooling obligation. ALRI had recommended that a child 18 years of age or over should have an obligation to become financially independent. The *Family Law Act* reflects this recommendation by requiring a child from 18 to 22 years of age to make a reasonable contribution to his or her own education [**s. 49(4)**]. (In Alberta, the *Divorce Act* obligation to a child age 18 or older who is unable to withdraw from the parents' charge by reason of disability is now encompassed by the public law assumption of responsibility by the state to care for disabled adults: *see heading* **Support for Person in Need, Bill 45**, *infra*, p. 24.) The *Family Law Act* provisions modify ALRI's recommendation for consistency with the *Divorce Act*. Nevertheless, they foster our underlying principle of equality among children, that is, that child support law should be substantially the same for all children whose parents are in a broken relationship.

Where paternity is in issue and cannot be determined, the court may order all of the men who might be the father to pay child support [**s. 50(5)**]. This provision is carried forward from the *Parentage and Maintenance Act* and accords with ALRI's recommendations.

We had concerns about the calculation of child support under Bill 45 in its original form. The Bill reintroduced a general discretion in the court to award child support in accordance with the needs of the child and the financial resources of the parents. It disregarded the role that the Federal Child Support Guidelines under the *Divorce Act* had already played with respect to the calculation of child support in Alberta and elsewhere in Canada. The fall amendments to the Bill rectified this oversight, such that the *Act* now requires the court to make a support order in accordance with the "prescribed guidelines." The guidelines may be prescribed in

the Regulations under the *Act* [**s. 107(f) and (2)**]. Marlene Graham, Q.C., the MLA who introduced the amendments, stated that it was government's intention to apply the federal guidelines.[6]

As provided in the *Divorce Act* and recommended by ALRI, the *Act* makes it clear that a court order may override a child support agreement [**s. 53(2)**].

Part 3, Division 2 – Support of Spouse or Adult Interdependent Partner, sections 56-63

The *Family Law Act* imposes an obligation on spouses, and adult interdependent partners, to support each other [**s. 56**]. The court may make an order giving effect to the obligation where the relationship has been declared to be irreconcilable, the couple are living separate and apart, or they are experiencing such discord that they cannot reasonably be expected to continue living together, or necessaries are not being provided by the one who is capable of providing them [**s. 57**]. ALRI would have limited its private law legislation to relationship breakdown situations. As such, we would have excluded cases involving the failure to provide necessaries where the relationship is still intact. Situations requiring state interference with intact families we saw as matters to be addressed through provisions in public law.

The *Act* details factors to be considered in determining whether to award support and in what amount [**s. 58**]. These factors embody ALRI's recommendations for taking into account support obligations to other persons and the financial circumstances in the household in which each former spouse or adult interdependent partner now lives. The general factors influencing support awards reproduce the factors in section 17(4) of the *Domestic Relations Act* and section 15.2(4) of the *Divorce Act* [**s. 58(a)**]. As recommended by ALRI, conduct only becomes a factor where it "arbitrarily or unreasonably" impacts on the need for support or ability to pay [**s. 59**]. Also in accordance with our recommendation, the four objectives of support parallel the four objectives specified in section 15.2(6) of the *Divorce Act* [**s. 60**].

As provided in the *Divorce Act*, and recommended by ALRI, child support takes priority over spousal support [**s. 61**]. Similarly, child support takes priority over adult interdependent partner support [**s. 61**].

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[6] Alberta, Legislative Assembly, *Hansard*, (27 November 2003) at 1952 (Marlene Graham).

Spouses or adult interdependent partners may enter into a written support agreement, but an agreement cannot be used to vary a support order [**s. 62(1) and (2)**]. The *Act* limits the authority of the court to override an agreement [**s. 62(3)**]. The limitation comes from section 27 of the *Domestic Relations Act*, which is based, in turn, on a recommendation in ALRI's Report No. 53 on *Unmarried Cohabitants*.

The *Family Law Act* adopts ALRI's recommendations with respect to the termination of the support obligation. Unless the court orders otherwise, the obligation under a support order terminates on the death of the spouse or adult interdependent partner to whom support is paid [**s. 63(1)**]. Arrears are not affected [**s. 63(2)**]. Unless the support order or an agreement entered into after proclamation provides otherwise, the estate of the spouse or adult interdependent partner having the support obligation is bound [**s. 80**].

Support for Person in Need, Bill 45

Division 3 of Bill 45 (sections 64-82) carried forward from the *Maintenance Order Act* the support obligations toward destitute or disabled adult family members that had been imposed on parents and children, grandparents and grandchildren, early in the 20th century. Over the years, as a government-operated social safety network came into being, the *Maintenance Order Act* had fallen into general disuse. We were concerned that legislating it in a modern statute amounted to taking a step backward in time. In our submission on the Alberta Justice Workbooks, we drew attention to the issue of the boundary between public and private law responsibilities toward adult members of our society. Our concern to draw a line was shared by others. The fall amendments reversed the earlier policy decision by deleting Division 3 altogether. According to statements recorded in *Alberta Hansard*, Division 3 was removed "primarily in order to achieve greater consistency with our government's policy of encouraging financial independence of disabled adults."[7] In short, the government now recognizes its role in supporting the independence of disabled adults.[8]

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[7] Alberta, Legislative Assembly, *Hansard*, (19 November 2003) at 1755 (Marlene Graham).

[8] Alberta, Legislative Assembly, *Hansard*, (27 November 2003) at 1947 (Marlene Graham).

Part 3, Division 3 – General Matters, sections 64-82

Division 3 deals with an array of matters that apply to both child and adult support obligations. The *Maintenance Enforcement Act* is available to enforce support agreements [**s. 64**]. As already stated, ALRI did not deal with enforcement. Provision is made for the disclosure of financial information and for terms and conditions with respect to the content of a support order [**ss. 65 and 66**]. These provisions carry out several ALRI recommendations. The court powers include power to vary, suspend or terminate a support order or any part of it, prospectively or retroactively [**s. 77**]. Here again, the influence of ALRI's recommendations is apparent, particularly in the identification of the circumstances which must be satisfied before the court may vary a support order [**ss. 77(4) and (5)**].

A welcome addition to Alberta's legislation governing financial support is found in sections that permit the court making a support order to include orders relating to possession of the primary family home, surrounding property and household goods [**ss. 67-76**]. Many of these provisions are drawn from the *Matrimonial Property Act*, Part 2, which permits the court to make such orders in connection with the distribution of matrimonial property. ALRI dealt with issues pertaining to the matrimonial home in Report for Discussion No. 14, published in March 1995.

Part 4 – General Powers of Court, sections 83-100

Part 4 of the *Family Law Act* covers a range of general powers of the court, some of which are new and many of which are carried forward from existing legislation. The reference to a "declaration of irreconcilability" is new [**s. 83**]. The court may make a declaration of irreconcilability where a relationship has broken down and no prospect of reconciliation exists. The court may order interim relief where appropriate [**s. 84**]. A hearing is not required where the parties are in agreement respecting the matters in question in an application and consent to an order or declaration on the agreed terms [**s. 85**]. The court may incorporate all or part of a written agreement in its order [**s. 86**]. Certain documents are rendered admissible in evidence [**s. 87**], the court may proceed in the absence of a respondent who fails to appear [**s. 88**] and a decision may be appealed in accordance with the regulations [**ss. 89-90**]. The court may prohibit future frivolous and vexatious applications [**s. 91**], or stay proceedings or an order or declaration [**s. 92**]. Costs may be ordered at any time in a proceeding on any conditions that the

court considers appropriate [**s. 93**]. A guardian, or any individual appointed by the court, may bring or defend an action on behalf of a child who is a party to an application [**s. 95(1) and (2)**]. As recommended by ALRI, proceedings to determine child support may be commenced, but not heard, before the child's birth [**s. 94**]. Also following our recommendation, the court may order relief for a child where it is satisfied that an application for relief for a spouse or interdependent partner should have included the child [**s. 96**].

The court has a statutorily-conferred discretion to take a number of initiatives, without an application:

- appoint an individual to represent the interests of a child [**s. 94(3) and (4)**];
- appoint a mediator or a neutral third party to assist the parties in resolving all or part of the matters in issue [**s. 97**]; and
- require the parties to attend any course or program prescribed by the regulations [**s. 98**].

These provisions are new. In each of these instances, the court is required to allocate the costs among the parties.

The court also has power to hold a proceeding in private [**s. 99**] and to protect the well-being of a child by prohibiting the publication or broadcast of any report that may identify the child [**s. 100**]. These provisions further ALRI's recommendations.

Part 5 – Other Actions, sections 101-106

In ALRI Report No. 65, on *Family Relationships: Obsolete Actions*, we recommended the repeal of several obsolete actions denoting family relationships. Our recommendations are reflected in the *Family Law Act*, Part 5. The *Act* abolishes the actions for restitution of conjugal rights, jactitation of marriage, and damages for adultery or the loss of services of a spouse or child as a result of enticement or harbouring of the spouse or child or the seduction of the child [**s. 103**]. The remedy for an action for breach of promise to marry is limited to the recovery of pecuniary damages [**s. 101**], whereas ALRI would have abolished the action altogether. As recommended by ALRI, fault regarding the failure to marry is not a factor in determining the right of a person who made a gift in contemplation of or conditional on marriage to recover the gift [**s. 102**].

The common law concept of unity of the legal personality of husband and wife is abolished [**s. 104**].[9] In accordance with ALRI's recommendations, the *Act* abolishes a wife's common law right to pledge her husband's credit for necessaries [**s. 105**] and the common law presumption of the implied agency of a wife to render her husband liable for necessaries supplied by a third party [**s. 106**].

Part 6 – Regulations, section 107

The *Family Law Act* gives the Lieutenant Governor in Council wide powers to make regulations [**s. 107**], including family law rules of procedure [**s. 107(1)(i)**].

Part 7 – Transitional Provisions, Consequential Amendments, Repeals and Coming into Force, sections 108-130

The final sections of the *Family Law Act* provide for the transition of family law from the existing statutes to the new provisions. The new *Act* covers the subject matter formerly dealt with in the *Domestic Relations Act*, *Maintenance Order Act*, *Parentage and Maintenance Act* and Part 3 of the *Provincial Court Act*, so this legislation is repealed [**ss. 122(3) and 129**]. Amendments consequential to the implementation of the new provisions are made to several statutes [**ss. 110-128**].

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[9] This section appears to perform a function similar to that of the *Married Women's Act*, R.S.A. 2000, c. M-6.